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No. 809

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH TOMLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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The opinion of the Court of Appeals (Pet. 20–27) is reported at 250 F. 2d 549.

JURISDICTION

The judgment of the Court of Appeals (R. 20–27) was entered on December 26, 1957. A petition for rehearing was denied on January 30, 1958. The petition for a writ of certiorari was filed on February 25, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing various requests to charge, including one to the effect that the testimony of an accomplice must be corroborated.

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QUESTIONS PRESENTED

1. Whether the trial court erred in refusing various requests to charge, including one to the effect that the testimony of an accomplice must be corroborated.

2. Whether the trial court gave an erroneous charge on character evidence.

RULES INVOLVED

Federal Rules of Criminal Procedure, Rule 30, provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Criminal Procedure, Rule 52 (b), provides in pertinent part:

> * * * * *
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On February 16, 1956, petitioner and Andrew Wright were indicted in the United States District Court for the Middle District of Georgia for conspiracy to violate 18 U. S. C. 641 (retaining government property known to have been stolen) and for substantive violations of the same statute (R. 2–9). Wright pleaded guilty to all counts against him (R. 10). Petitioner pleaded not guilty, went to trial before a jury and was found guilty only of the conspiracy (count one). He was sentenced to imprisonment for a term of 3 years (R. 11, 549, 550) and the conviction was affirmed on appeal (Pet. 20–27).

Wright, testifying for the Government, stated that he was a warehouseman at Robins Air Force Base located at Warner Robins, Georgia (R. 19). In November 1954, one Mr. Clot showed Wright some "breakers" (small aircraft parts) and asked Wright if he "could get hold of some of them for him" (R. 20). Clot told Wright that if he could get them he was to bring them to the Central Hotel in Macon, Georgia (R. 20). Over a period of a few days, Wright stole breakers from the air force base, stored them in his hotel room and, when he had collected a sufficient number, took them to the Central Hotel (R. 23, 24). When Wright got there, Mr. Clot pointed to the petitioner, who was also at the hotel, and told Wright to "take them to him" (R. 24). Wright took the breakers to the petitioner, and the petitioner counted them and paid Wright $80 (R. 24, 25). At the same time, petitioner asked Wright if he "could get some more of those" and he gave Wright a stock number of some other materials (scintilla breaker assemblies) which he was also anxious to have Wright procure (R. 26, 27). After stealing and collecting "a hundred or two" scintilla breaker assemblies in his apartment, Wright took them to the Central Hotel and turned them over to petitioner, who paid him $75 or $80 (R. 28, 29). Petitioner then gave Wright another stock number—the number of American-Bosch breaker springs—and said "he would like to have some of those" (R. 29, 30). American-Bosch breaker springs are packed in small glass tubes. In stealing these, Wright took the springs out of the tubes and discarded the tubes on the open air storage

lot at Robins Air Force Base (R. 86, 87). After Wright collected approximately 300 of these springs, he took them to petitioner who again paid him $75 or $80 (R. 30, 31). Later, when the F. B. I. began its investigation, Wright led an agent to the place where the tubes were discarded and turned the discarded tubes over to the F. B. I. (R. 87).

Some time after Christmas, 1954, Wright, in response to a request by petitioner, delivered to petitioner 15 motor gun chargers that Wright had stolen from the air base (R. 31, 32). At this time, petitioner also suggested to Wright that he obtain some aircraft spark plugs with platinum points, but Wright refused to steal any (R. 32, 33). When Wright was arrested by the F. B. I., he had in his possession one of petitioner's business cards (R. 33) and a "stock number" which had been given to him by petitioner (R. 34, 35).

James Stauble, a resident of the Macon Hotel in Macon, Georgia, testified that on May 9, 1955 (the night before petitioner was arrested), he received a message from petitioner and Mr. Clot that they wanted to see him (R. 454, 455). When Stauble reached Clot's room (located in the same hotel), he heard petitioner and Mr. Clot talking about a Mr. Paster (R. 457), identified by petitioner at the trial as a dealer in precious metals, including platinum, in Detroit, Michigan, and a person with whom petitioner had been doing business for about 10 years (R. 339–342). Petitioner instructed Stauble to make three telephone calls: one to a man in Detroit, Michigan; one to petitioner's sister in Pennsylvania; and one to

petitioner's lawyer (R. 457). On the call to Detroit, petitioner instructed Stauble to say nothing but "They have Joe surrounded, be careful." Stauble was then to "hang right straight up" (R. 458). On the call to petitioner's sister, Stauble was instructed to ask if "she sent the invoices down and if she did how did she send them, and to who did she send them to". If Stauble received any invoices from petitioner's sister, he was told to "destroy them period" (R. 460).

In an interview with an F. B. I. agent in September, 1955, petitioner admitted that he shipped 100 American-Bosch breaker springs to Dallas, Texas, and 754 of the same type of springs to Rochester, New York (R. 84). He stated, however, that he had purchased them at Robins Air Force Base (R. 84). He also admitted that he shipped spark plugs to Rochester, New York, and small motors, which he alleged were purchased at the Robins Air Base, to Buffalo, New York (R. 84, 85, 86).

Petitioner testified that he met Wright at Robins Air Force Base and that he invited Wright to call upon him (R. 285). He denied that he received any property from Wright, but admitted that an arrangement existed between Wright and himself (R. 285, 286). He said that, because of the lack of "clear identification" of the packed merchandise which he normally bought at Robins Air Force Base, it was difficult for a bidder to know what he was getting before he bought it and unpacked it (R. 285, 319); that, in order to make a more informed bid, he asked Wright to notify him when any material came into

the base, giving the numbers on the package (R. 285, 286); that, from the numbers, he could get a good idea as to what kind of merchandise the package contained; and that, in return for this information, he gave Wright "a couple of dollars" (R. 287.)

ARGUMENT

1. After the court charged the jury, the following colloquy took place (R. 542–543):

> By the COURT: I will hear first from the defendant.
>
> Mr. MILLER [petitioner's counsel]: Your Honor, the only exception and request that we would have would be that our written requests that have already been submitted, which Your Honor has considered, I feel confident that it would be needless for me to pick them up and read those that the Court has not charged. That's not necessary is it, sir?
>
> By the COURT: I don't think so. You can just except to all those which I did not give.
>
> Mr. MILLER: That is my intention, sir.
>
> By the COURT: I believe that would be sufficient.

In affirming the conviction, the Court of Appeals noted that petitioner's objections were not really specific enough to constitute compliance with Rule 30, F. R. Crim. P., but that, nevertheless, "we have considered these specifications of error and find no merit in them" (Pet. 23). It is thus evident that petitioner's contention that the court below erred in its interpretation of Rule 30 is not an issue in this case.

The court below was correct in its ruling that no error had been committed in refusing petitioner's requests.

a. Petitioner's first requested instruction (Pet. 4) stated that the jury would not be authorized to convict on the testimony of Wright alone, unless the jury believed his testimony beyond a reasonable doubt. This requested instruction merely stated that in order to convict petitioner the jury had to be satisfied beyond a reasonable doubt that he was guilty. This was fully covered by the following instruction, given after the court stated that the Government must prove its case beyond a reasonable doubt (R. 527):

> * * * If you have such a doubt as that you should give the defendant the benefit of the doubt and acquit him, as you should convict only if you believe him guilty beyond a reasonable doubt. A reasonable doubt is an honest, substantial doubt * * * arising either from evidence favorable to the defendant or from want of evidence on behalf of the Government. * * *

This instruction was more than adequate and there was no need to grant petitioner's request.

b. Petitioner's second and third requests were to the effect that the jury should rarely convict on the testimony of an accomplice alone, that the testimony of an accomplice should not be given unlimited credence without corroboration, and that such testimony should be scanned with extreme care (Pet. 4). The judge charged (R. 526):

> I charge you in this connection that he is an alleged accomplice, and that you should in considering the testimony of an alleged accomplice, his testimony should be scanned with great care and received with great caution * * * and if by reason of the fact that he is an accom-

> plice you would not be willing to accept any part of his testimony, then you would be authorized to disregard it. * * *

This was correct under the principles laid down by this Court. As stated in *Caminetti* v. *United States,* 242 U. S. 470, 495, although accomplice testimony should be received with caution, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."[1] See also *Nilva* v. *United States,* 212 F. 2d 115 (C. A. 8), certiorari denied, 348 U. S. 825; *Catrino* v. *United States,* 176 F. 2d 884 (C. A. 9); *United States* v. *Schwartz,* 150 F. 2d 627 (C. A. 2), certiorari denied, 326 U. S. 757.

c. Petitioner's fourth request was to the effect that the arrangement with Wright, as described in petitioner's testimony (R. 285), was not criminal and would not authorize a conviction (Pet. 5). There was no need to grant this request because the court covered this point adequately and clearly in the following instruction (R. 534):

---

[1] The cases relied upon by petitioner do not support his contention that accomplice testimony must be corroborated. In *Holmgren v. United States*, 217 U. S. 509, 524, this Court merely stated that it was *the better practice* to require corroborating testimony but, as pointed out by this Court in the *Caminetti* case, the *Holmgren* case did not create an absolute rule. *Johns* v. *United States*, 227 F. 2d 374 (C. A. 10) reiterated the holding in the *Caminetti* case. And in *Gormley* v. *United States*, 167 F. 2d 454 (C. A. 4), the Court of Appeals upheld a charge which not only stated the usual rule as to caution, but said "if the testimony of an accomplice carries conviction and the jury are convinced it is true, the jury should give it the same effect as would be allowed to a witness not in any respect implicated in the offense." (P. 457.)

When I use the word "agreement" I mean an agreement to violate the law as set out in this indictment. Of course there are a great many laws and a great many crimes under the various statutes and the conspiracy statute applies to an agreement to violate any criminal law of the United States no matter what it is. But this indictment *says that these defendants agreed or had an understanding among themselves that they would violate the laws of the United States* in certain respects set out here in the indictment. I charge you, therefore, that the agreement or understanding *must be an agreement to violate the law in the respect set out in this indictment itself,* that is in Count One, and in the long or first or charging part of Count One.

The first thing you will determine in this case is whether or not there was an agreement among or between two or more persons, and whether or not the defendant Joseph Tomley was a party to that agreement as alleged in the indictment. If there was no such understanding then you would just find a verdict of not guilty on Count One, because it is necessary that there should have been an agreement or an understanding to constitute a conspiracy. [Emphasis added.]

d. Petitioner's fifth request presented the proposition of law that every knowing conversion of property is not necessarily a criminal conversion (Pet. 6). This point was also adequately covered by the trial court's charge:

* * * You must further find beyond a reasonable doubt that this defendant received the

> property involved from Andrew Jackson Wright, and at the time he received it he knew that it was stolen from the United States of America and that the defendant, with such knowledge, received the property with the intent to defraud the United States of America, for instance, by retaining it as his own or by selling it as his own.
>
> I charge you that in all of the counts involved in this indictment, one, two and three, a necessary element of each offense charged in the counts is criminal intent on the part of the defendant to defraud the United States of America. (R. 538, 539.)

2. Petitioner contends that the trial court's charge on character evidence was "plain error affecting substantial rights" (Pet. 16) and should have been noticed on appeal, pursuant to Rule 52 (b) of the Federal Rules of Criminal Procedure, because it did not advise that evidence of good character alone could raise a reasonable doubt of petitioner's guilt. The argument has no foundation, for the court explicitly charged (R. 531–532):

> Good character is a positive, substantive fact and may of itself be sufficient, if it is proven to exist, to generate in the minds of the jury a reasonable doubt as to the guilt of a defendant. If this jury should think, from all of the testimony together, that notwithstanding the evidence of good character the defendant nevertheless did what he is charged with doing then you ought to convict him. In other words a jury would not be authorized to acquit because of good character. The law contains no provision like that. But if the jury thinks the

> defendant actually committed the offense which he is charged with committing, whether he has good character or not, he ought to be convicted. But if he did not commit the offense with which he is charged, even though he may be a man of bad character in your judgment he ought to be acquitted. As I say, the character evidence is to be considered along with all of the other testimony in the case in determining whether the defendant did what he is actually charged with doing.

The charge given was in accord with the ruling of this Court in *Edgington* v. *United States*, 164 U. S. 361, 366. See, also, *Michelson* v. *United States*, 335 U. S. 469.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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